



## The Internal Corporate Investigation

Thomas R. Mulroy

Eric J. Munoz

Follow this and additional works at: <https://via.library.depaul.edu/bclj>

---

### Recommended Citation

Thomas R. Mulroy & Eric J. Munoz, *The Internal Corporate Investigation*, 1 DePaul Bus. & Com. L.J. 49 (2002)

Available at: <https://via.library.depaul.edu/bclj/vol1/iss1/3>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Business and Commercial Law Journal by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

# The Internal Corporate Investigation

Thomas R. Mulroy & Eric J. Muñoz<sup>1</sup>

## I. INTRODUCTION

Internal corporate investigations have become an established response to allegations of improprieties on the part of the corporation, its officers, or its employees. A corporation may initiate an internal investigation in response to an ongoing government investigation or agency subpoena, pursuant to a consent decree with the Securities and Exchange Commission (SEC), the Internal Revenue Service (IRS), or another government agency. An investigation may also be prompted internally, through either a complaint or grievance from an employee or group of employees. Regardless of whether the investigation begins from inside or outside the organization, the corporation has a significant interest in protecting the confidentiality of counsel's findings and the investigative file. As company managers can appreciate, disclosure of non-public corporate information can lead to unforeseen and undesirable third-party actions, criminal prosecutions, or civil enforcement actions by government agencies against the corporation. Thus, the results of an investigation conducted as part of a good faith effort to respond to, investigate, and resolve an internal company problem could provide a road map for an adversary to establish civil or criminal liability of the corporation, its officers, or its directors. In today's complex business and regulatory environment, such an occurrence is one that every CEO can appreciate and, most critically, will want to avoid.

---

1. In January 2001, Mr. Mulroy, University of Santa Clara, California (B.A. 1968), Loyola University School of Law (J.D. 1972), left the partnership of Jenner & Block to found Mulroy Scandaglia Marrinson Ryan, a Chicago-based litigation boutique specializing in complex commercial litigation. Mr. Mulroy is a fellow of the American College of Trial Lawyers, has lectured on trial practice at Northwestern, Loyola, and DePaul Schools of Law, and has written extensively on trial issues such as expert witnesses, evidence, simulated juries and cross-examination. Mr. Muñoz, Stanford University (B.A. 1992), University of Iowa College of Law (J.D. 1999), is an associate with Mulroy Scandaglia Marrinson Ryan, and concentrates in commercial litigation and appeals. Mr. Muñoz served as law clerk to the Hon. Robert W. Pratt, U.S. District Court, Southern District of Iowa, from 1999-2001. The authors wish to acknowledge W. Joseph Thesing, Jr., who co-authored an earlier version of this article, *Confidentiality Concerns in Internal Corporate Investigations*, 25 TORT & INS. L. J. 48 (1989).

In light of the potential problems that can occur in the context of an internal investigation, corporate counsel – whether drawn from in-house or hired from the outside – should seek to minimize corporate exposure to adverse proceedings. To that end, the corporation and its counsel must be active in structuring the investigation so as to take full advantage of the protections of the attorney-client privilege and the work product doctrine. Maximizing the protections afforded by the attorney-client privilege and work product doctrine, while at the same time minimizing the potential hazards that may arise during an investigation, should be a principal goal of counsel in overseeing any serious internal investigation.

## II. BACKGROUND

An integral part of analyzing an internal corporate investigation is to first establish a clear understanding of the legal protections that are likely to be involved. Part A examines the characteristics of the attorney-client privilege.<sup>2</sup> Part B analyzes the components of the work product doctrine.<sup>3</sup>

### A. Attorney-Client Privilege

The attorney-client privilege protects confidential communications between an individual and his/her attorney. It has been noted that the attorney-client privilege “interferes with the truth seeking mission of the legal process,” and therefore is not “favored.”<sup>4</sup> The Supreme Court, however, has expressly recognized that the attorney-client privilege enjoys a special position as “the oldest of the privileges for confidential communications known to the common law,” and that the privilege serves a salutary and important purpose, “[to] encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”<sup>5</sup>

---

2. See *infra* Part II.A.

3. See *infra* Part II.B.

4. See, e.g., *United States v. Aramony*, 88 F.3d 1369, 1389 (4th Cir. 1996), *cert. denied*, 520 U.S. 1239 (1997); see also *United States v. Olano*, 62 F.3d 1180, 1205 (9th Cir. 1995), *cert. denied*, 519 U.S. 931 (1996) (commenting that the privilege operates to “withhold[ ] relevant information from the fact finder”) (citation and internal quotations omitted); *Myers v. Uniroyal Chem. Co., Inc.*, No. CIV.A.916716, 1992 WL 97822, at \*1 (E.D. Pa. May 5, 1992) (“Privileges in litigation are not favored.”) (citing *Herbert v. Lando*, 441 U.S. 153, 175 (1979)). See generally Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 NOTRE DAME L. REV. 157 (1993) (critiquing theory behind attorney-client privilege).

5. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

Where the client is a corporation, the application of this privilege becomes slightly more complicated. In general, a corporation is entitled to the same protection of confidentiality that individual clients receive under the attorney-client privilege.<sup>6</sup> The difficulty in applying the privilege in the corporate context arises from the inanimate nature of a corporation, which can only “speak” to its attorney through its agents.<sup>7</sup> Yet it is clear that the corporation’s lawyer represents not individual agents but the corporation and thus, application of the attorney-client privilege often turns on which corporate officials and employees sufficiently personify the corporate entity as a client.<sup>8</sup>

### 1. Essential Elements of the Attorney-Client Privilege

The essential elements of the privilege are contained in Judge Wyzanski’s widely-cited opinion in *United States v. United Shoe Machinery Corp.*<sup>9</sup> The privilege applies if: (1) the person asserting the privilege is or seeks to become a client; (2) the person to whom the communication was made is an attorney or his subordinate, acting in his capacity as an attorney with respect to the communication; (3) the communication relates to a fact of which the attorney was informed by the client in confidence; (4) the communication relates to the seeking of legal advice or assistance and is not for the purpose of committing a crime or tort; and (5) the privilege has been claimed and not waived.<sup>10</sup>

The burden is on the proponent to demonstrate that the attorney-client privilege applies.<sup>11</sup> If that party demonstrates its applicability, then communications between attorney and client, absent waiver, will receive absolute and complete protection from disclosure.<sup>12</sup> However, transferring these requirements into the corporate context poses a significant challenge.

### 2. Defining Client in the Corporate Context

#### a. Corporate Employees With Relevant Information

*Upjohn Co. v. United States*<sup>13</sup> is the starting point for determining who the client is in the corporate context. As explained below, *Upjohn* is notable for its holding with respect to the applicability of

---

6. *Id.* at 389-90.

7. *See id.* at 390.

8. *See id.* at 391-92.

9. *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357 (D. Mass. 1950).

10. *Id.* at 358-59; *see also* 8 J. WIGMORE, EVIDENCE § 2292 (McNaughton rev. ed. 1961).

11. *See United States v. Stern*, 511 F.2d 1364, 1367 (2d Cir. 1975), *cert. denied*, 423 U.S. 829 (1975).

12. *See In re Grand Jury Proceedings*, 102 F.3d 748, 750 (4th Cir. 1996).

13. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

the attorney-client privilege in connection with an internal corporate investigation.

In *Upjohn*, independent accountants, conducting an audit for the Upjohn Company, informed the company's in-house general counsel that certain improper payments had been made to foreign government officials to win government business.<sup>14</sup> The general counsel, outside counsel, and the Chairman of the Board decided to conduct an internal investigation of the matter.<sup>15</sup>

As part of this investigation, Upjohn's attorneys sent a letter containing a questionnaire to all of its foreign managers.<sup>16</sup> The letter, signed by Upjohn's Chairman, stated that the company's general counsel was conducting an investigation into the matter and that management needed full information concerning any possible illegal payments.<sup>17</sup> The enclosed questionnaire sought detailed information concerning such payments, and the responses were to be sent directly to the general counsel.<sup>18</sup> Recipients of the questionnaire were instructed "to treat the investigation as 'highly confidential' and not to discuss it with any one, other than Upjohn employees, who might be helpful in providing the requested information."<sup>19</sup> Upjohn's attorneys kept the responses confidential.<sup>20</sup> Upjohn's general counsel and outside counsel also interviewed these managers and some thirty-three other Upjohn officers or employees.<sup>21</sup>

The company voluntarily submitted a preliminary report to both the SEC and the IRS.<sup>22</sup> The IRS later sought all the files relating to the investigation, including the written questionnaires, and notes and memoranda of counsel-employee interviews.<sup>23</sup> Upjohn objected to the production of these materials on attorney-client privilege and work product grounds.<sup>24</sup>

In deciding to apply the privilege to the communications of lower-level managers, the Court rejected the "control group" test, under which only those communications between counsel and upper-echelon (or "control group") management would be privileged.<sup>25</sup> The court

---

14. *Id.* at 386.

15. *Id.*

16. *Id.*

17. *Upjohn*, 449 U.S. at 387.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Upjohn*, 449 U.S. at 387.

22. *Id.*

23. *Id.* at 387-88.

24. *Id.* at 388 (arguing that the materials were prepared in "anticipation of litigation").

25. *Upjohn*, 449 U.S. at 388.

observed that, in the context of rendering legal advice to a corporation concerning actual or potential difficulties, it is natural for counsel to obtain “relevant information” from not only “control group” employees, but “[m]iddle-level – and indeed lower-level – employees” as well.<sup>26</sup> Citing the purpose behind the privilege – namely, “full and frank communication between attorneys and their clients” – the Court rejected the “narrow” control group test and held that such a test, “cannot, consistent with the principles of the common law, . . . govern the development of the law in this area.”<sup>27</sup>

*Upjohn* gives broad protection to the confidential communications of any corporate employee – not just control group members – who, during a legal investigation, supplies relevant information to corporate counsel.<sup>28</sup> In *Upjohn*, the following factors supported application of the privilege: (1) the interviews occurred at the direction of corporate counsel; (2) employee communications were made to corporate counsel acting as such; (3) the information sought was not available from “control group” management; (4) the communications were within the scope of the employees’ duties; and (5) the employees were aware that they were being questioned in order for the corporation to secure legal advice.<sup>29</sup> Although lower federal courts have not required all of the *Upjohn* factors to be present before finding certain communications privileged,<sup>30</sup> counsel would be well to emulate as many of these *Upjohn* factors as possible in order to maximize the chances that a court will find investigative files privileged.

Although *Upjohn* ultimately applied the privilege to communications between counsel and lower-level corporate employees, its holding is not universally followed and the opinion is still the subject of much interpretation, especially in federal diversity cases and state court litigation.

#### b. Limits

There are some limitations to the *Upjohn* decision that should be noted. First, the holding in *Upjohn* is grounded in the federal common law of attorney-client privilege.<sup>31</sup> In other words, *Upjohn* will

---

26. *Id.* at 391.

27. *Id.* at 389, 397 (citing FED. R. EVID. 501).

28. *See id.*

29. *Upjohn*, 449 U.S. at 384.

30. *See, e.g.,* *Baxter Travenol Labs., Inc. v. Lemay*, 89 F.R.D. 410, 412-14 (S.D. Ohio 1981) (privilege upheld where communications made outside scope of employee’s duties); *Leucadia, Inc. v. Reliance Ins. Co.*, 101 F.R.D. 674, 678 (S.D.N.Y. 1983) (privilege upheld where communication made without expectation of confidentiality).

31. *See Upjohn*, 449 U.S. 383.

apply in federal question cases that use federal common law to decide privilege questions.<sup>32</sup> However, *Upjohn* may not necessarily apply in diversity proceedings where the federal court, in deciding privilege questions, is obligated to use state privilege law, which could vary from state to state.<sup>33</sup>

Second, the ruling in *Upjohn* is not binding upon state courts. In fact, according to one recent survey, only fourteen states (either through judicial decision or legislative enactment) have adopted *Upjohn*'s rule on corporate attorney-client privilege, eight states have adopted the "control group" test, and the remaining states have not definitively decided on a particular approach.<sup>34</sup> Thus, if attorney-client questions in the corporate context are litigated in state court, counsel should consult the relevant state's law on attorney-client privilege to determine the applicable privilege standard.

---

32. See *United States v. Zolin*, 491 U.S. 554, 562 (1989) ("Questions of privilege that arise in the course of the adjudication of federal rights are 'governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.'") (citing FED. R. EVID. 501); *In re Bieter Co.*, 16 F.3d 929, 935 (8th Cir. 1994) (applying "the federal common law of attorney client privilege" to civil RICO action).

33. That *Upjohn*'s federal common law holding on privilege is circumscribed by state law flows from Federal Rule of Evidence 501, the rule upon which the *Upjohn* holding was premised. Rule 501 provides that in civil actions and proceedings where state law supplies the substantive rule of decision (i.e., most diversity litigation) the privilege of a witness "shall be determined in accordance with State law." In all other cases (as happened in *Upjohn* where a federal tax provision was at issue), Rule 501 provides that the privilege of a witness "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." See generally Sherman L. Cohn, *The Organizational Client: Attorney-Client Privilege and the No-Contact Rule*, 10 GEO. J. LEGAL ETHICS 739, 755-60 (1997); James Heckmann, *Evidence—Upjohn v. United States—Corporate Attorney-Client Privilege*, 7 J. CORP. L. 359, 370-71 (1982).

34. Brian E. Hamilton, *Conflict, Disparity, and Indecision: The Unsettled Corporate Attorney-Client Privilege*, 1997 ANN. SURV. AM. L. 629, 633-40 (1997) (noting that the fourteen states adopting some version of *Upjohn*'s expansive reading of the corporate attorney-client privilege are: Alabama (ALA. R. EVID. 502(a)(2)); Arizona (ARIZ. REV. STAT. § 12-2234 (West 2002)); Arkansas (*Courteau v. St. Paul Fire & Marine Ins. Co.*, 821 S.W.2d 45 (Ark. 1991)); California (*D.I. Chadbourne, Inc. v. Superior Court*, 388 P.2d 700 (Cal. 1964) (en banc)); Colorado (*Denver Post Corp. v. Univ. of Colo.*, 739 P.2d 874 (Colo. 1987)); Florida (*Southern Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377 (Fla. 1994)); Kentucky (KY. R. EVID. 503(a)(2)); Louisiana (LA. CODE EVID. ANN. art. 506(a)(2) (West 2002)); Mississippi (MISS. R. EVID. 502(a)(2)); Nevada (*Wardleigh v. Dist. Court*, 891 P.2d 1180 (Nev. 1995)); Oregon (OR. EVID. CODE R. 503(1)(d) (2002)); Texas (TEX. R. CIV. EVID. 503(a)(2)); Utah (UTAH R. EVID. 504(a)(4)); Vermont (*Baisley v. Missisquoi Cemetery Ass'n*, 708 A.2d 924 (Vt. 1998)). The eight states rejecting *Upjohn* and adopting the narrow control group standard for corporate attorney-client privilege are: Alaska (ALASKA R. EVID. 503 (a)(2)); Hawaii (HAW. R. EVID. 503(a)(2)); Illinois (*Consolidated Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250 (Ill. 1982)); Maine (ME. R. EVID. 502(a)(2)); New Hampshire (N.H. R. EVID. 502(a)(2)); North Dakota (N.D. R. EVID. 502(a)(2)); Oklahoma (OKLA. STAT. ANN. tit. 12, § 2502(A)(4) (West 2002)); South Dakota (S.D. CODIFIED LAWS § 19-13-2(2) (Michie 2002)). See Hamilton, *supra*, at 640.

### c. Former Employees

There is authority for the proposition that former corporate employees who, during the course of an investigation, communicate with corporate counsel about a matter within that former employee's scope of employment, will also enjoy the protections of the attorney-client privilege.<sup>35</sup> In his concurring opinion, Chief Justice Burger stated that a former employee's communications are privileged when the employee "speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment."<sup>36</sup> Many lower federal courts have endorsed this view and found communications between corporate counsel and former employees to be privileged.<sup>37</sup> Although protection for the communications of former employees reflects a majority view in the law, there is contrary authority grounded in state law.<sup>38</sup> Of course, as is the case with any issue, counsel litigating former-employee questions should research the law of the relevant jurisdiction to determine the applicability of the attorney-client privilege to former employees.

### 3. Communications With An Attorney

The protections of the attorney-client privilege extend to communications with an attorney's agent only if the attorney is using the agent to facilitate the rendering of legal advice and the agent is acting under the direct supervision of the attorney.<sup>39</sup> Communications from agents, not acting pursuant to direction from counsel, will likely not be held as

---

35. *Upjohn*, 449 U.S. at 403 (Burger, C.J., concurring).

36. *Id.*

37. See *In re Coordinated Pretrial Proceedings In Petroleum Prod. Antitrust Litig.*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982) (The *Upjohn* "rationale applies to the ex-employees . . . involved in this case. Former employees, as well as current employees, may possess the relevant information needed by corporate counsel to advise the client"); *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1493 (9th Cir. 1989); *Porter v. Arco Metals Co.*, 642 F. Supp. 1116, 1118 (D. Mont. 1986) (*Upjohn* indicates that "the attorney-client privilege may extend to [defendant's] former employees . . . [with regard to their communications with] the company's counsel."); *United States v. King*, 536 F. Supp. 253, 259 (C.D. Cal. 1982) ("[An attorney-client] relationship existed even though [the witness] was not an employee of [the client] at the time of the conversation."), *overruled on other grounds by* *United States v. Zolin*, 842 F.2d 1135 (9th Cir. 1988); *Amarin Plastics, Inc. v. Maryland Cup Corp.*, 116 F.R.D. 36, 41 (D. Mass. 1987) ("In some circumstances, the communications between a former employee and a corporate party's counsel may be privileged.").

38. See, e.g., *Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co.*, 129 F.R.D. 515, 517-18 (N.D. Ill. 1990); *Connolly Data Sys., Inc. v. Victor Techs., Inc.*, 114 F.R.D. 89, 93-94 (S.D. Cal. 1987).

39. See *United States v. McPartlin*, 595 F.2d 1321, 1335-37 (7th Cir. 1979), *cert. denied*, 444 U.S. 833 (1979) (involving an investigator employed by co-defendant's counsel); *United States v. Cote*, 456 F.2d 142, 143-44 (8th Cir. 1972) (addressing whether the privilege prohibits disclosure of working papers and memoranda prepared by accountant employed by attorney for the purpose of rendering legal advice).



privileged.<sup>40</sup> Generally, corporate communications with either in-house or outside counsel are treated the same for purposes of the attorney-client privilege.<sup>41</sup>

In addition, if a corporation hires a specially-appointed counsel, pursuant to a consent decree with the SEC, to investigate and formulate legal advice, all materials are privileged.<sup>42</sup> However, the privilege will not apply if such counsel is hired mainly to investigate and report to the board of directors, or as one court put it, if special counsel is engaged "not for their legal acumen but for their skill as investigators."<sup>43</sup>

These protections are significant in the context of internal corporate investigations because counsel, in order to gather, analyze, and assess the facts and legal implications of an investigation, will frequently require assistance from accountants, investigators, and other attorneys. As the next section bears out, merely being a "lawyer" will not automatically render communications to and from the corporate client as privileged.<sup>44</sup> Rather, counsel and his/her agent must be acting principally as a lawyer.<sup>45</sup> In order to qualify for the privilege, a lawyer must, at a minimum, be involved not only in investigating the facts, but also in formulating and rendering legal advice and opinion.<sup>46</sup> Communications that only incidentally implicate counsel's legal judgment and advice will generally not be shielded under the attorney-client privilege.<sup>47</sup>

---

40. See *In re Grand Jury Proceedings*, 220 F.3d 568, 571 (7th Cir. 2000) (preparation of tax return is an accounting service, not the provision of legal advice; but "information transmitted to an attorney or to the attorney's agent is privileged if it was not intended for subsequent appearance on a tax return and was given to the attorney for the sole purpose of seeking legal advice"); *United States v. Brown*, 478 F.2d 1038, 1039-40 (7th Cir. 1973) (accountant's notes of conversation with client and attorney not privileged because client retained accountant and instructed him to attend meeting); see also *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984) (no accountant-client privilege exists under federal law for accountants acting as agents of a corporation).

41. *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 360 (D. Mass. 1950).

42. See *In re LTV Sec. Litig.*, 89 F.R.D. 595, 600 (N.D. Tex. 1981).

43. *Osterneck v. E. T. Barwick Indus., Inc.*, 82 F.R.D. 81, 85 (N.D. Ga. 1979); see also *Securities & Exch. Comm'n v. Canadian Javelin Ltd.*, 451 F. Supp. 594, 596 (D.D.C. 1978), *vacated on other grounds* by No. 76-2070, 1978 WL 1139, at \*1 (D.D.C. Jan. 13, 1978) (privilege did not attach to communications of special counsel who was appointed not to offer corporation advice, but to "monitor and report on" corporation's compliance with a court injunction).

44. See, e.g., *infra* notes 50-53 and accompanying text.

45. See, e.g., *infra* note 56 and accompanying text.

46. *Id.*

47. *Id.*

#### 4. Communications For the Purpose of Seeking Legal Advice

A corollary to the requirement that communications be made to an attorney or his/her agent is that such communications be made for the purpose of seeking legal advice.<sup>48</sup> The attorney-client privilege does not cover communications that are made for non-legal purposes.<sup>49</sup> For example, if corporate counsel acts as a business and not a legal adviser, the attorney-client privilege does not apply.<sup>50</sup> Moreover, if both a corporation and its counsel prepare a document for review, without a clear legal aim, it may not be privileged.<sup>51</sup> The privilege will not apply if a lawyer is hired solely as an accountant,<sup>52</sup> or when the lawyer acts as a negotiator or business agent.<sup>53</sup> On the other hand, some courts have held that, despite their technical nature, the attorney-client privilege does protect communications between an inventor and his patent attorney.<sup>54</sup>

In practice, corporate counsel wears many hats – advising and assisting the corporation with financial, business, technical, or human resource issues. Neither the corporation nor its counsel should have to forfeit the privilege because counsel has additional non-legal responsibilities. Judge Wyzanski made this point clear in an oft-quoted passage:

The modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable. And it is in

---

48. See *In re Diasonics Sec. Litig.*, 110 F.R.D. 570, 573 (D. Colo. 1986).

49. See *id.* (noting that the attorney-client privilege applies only to communications requesting legal advice made to an attorney by a client requesting legal advice).

50. See, e.g., *In re Feldberg*, 862 F.2d 622, 627 (7th Cir. 1988); *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984); *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1037 (2d Cir. 1984); *In re Diasonics Sec. Litig.*, 110 F.R.D. at 573; *North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 110 F.R.D. 511, 517 (M.D.N.C. 1986); *Securities & Exch. Comm'n v. Gulf & W. Indus., Inc.*, 518 F. Supp. 675, 683 (D.D.C. 1981).

51. See *FTC v. TRW, Inc.*, 628 F.2d 207, 212-13 (D.C. Cir. 1980) (credit reporting company and its counsel hired research group to put technical information concerning the company's computerized credit reporting system into a form that lawyers could understand; study held not privileged because its legal purpose was not clear).

52. See *In Re Colton*, 201 F. Supp. 13, 16 (S.D.N.Y. 1961).

53. See *J. P. Foley & Co., Inc. v. Vanderbilt*, 65 F.R.D. 523, 526 (S.D.N.Y. 1974).

54. See *In re Spalding Sports Worldwide, Inc.*, 203 F.3d 800, 805-06 (Fed. Cir. 2000) (holding that "an invention record constitutes a privileged communication, as long as it is provided to an attorney for the purpose of securing primarily legal opinion, or legal services, or assistance in a legal proceeding") (citation and internal quotations omitted); see also *Sperry v. Florida*, 373 U.S. 379, 383 (1963) ("[T]he preparation and prosecution of patent applications for others constitutes the practice of law."). But see *Spalding Sports*, 203 F.3d at 806 n.3 (noting contrary lower court authority, including: *Jack Winter, Inc. v. Koratron Co.*, 50 F.R.D. 225, 228 (N.D. Cal. 1970); *Howes v. Med. Components, Inc.*, No. CIV.A.84-4435, 1988 WL 15191, at \*1 (E.D. Pa. Feb. 23, 1988); *Detection Sys., Inc. v. Pittway Corp.*, 96 F.R.D. 152, 155 (W.D.N.Y. 1982); *Sneider v. Kimberly-Clark Corp.*, 91 F.R.D. 1, 5 (N.D. Ill. 1980); *Choat v. Rome Indus., Inc.*, 462 F. Supp. 728, 732 (N.D. Ga. 1978)).

the . . . public interest that the lawyer should regard himself as more than predictor of legal consequences. His duty to society as well as to his client involves many relevant social, economic, political and philosophical considerations. And the privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice.<sup>55</sup>

However, in the context of an internal investigation, corporate counsel must always keep in mind, regardless of the nature of their work, that their participation in a project must be seen chiefly as a provider of legal advice to the corporation. To the extent this is done *and can be proven*, corporate counsel will be in a much stronger position for asserting privilege as to communications and other investigative material which, although embodying factual and non-legal information, has as its main purpose the rendering of legal advice. Thus, despite the myriad of case law both upholding and rejecting privilege claims in the investigative context, counsel would be well to maintain and document its relationship with the corporate client during an investigation that is marked by traditional norms of seeking and rendering legal advice. This core principle – namely that investigative material that is the product of an attorney-client relationship should be protected – is embodied in the unanimous *Upjohn* opinion, as well as other federal court opinions.<sup>56</sup>

The courts, cognizant that the attorney-client privilege operates as a truth-sheltering device, will construe the privilege strictly. Assertions of the privilege where proof of legal advice is tenuous or ambiguous are often rejected. For example, in *Federal Trade Commission v. TRW, Inc.*, counsel for a credit reporting company (TRW), in anticipation of a Federal Trade Commission (FTC) investigation, hired an

---

55. *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950).

56. *See Upjohn Co. v. United States*, 449 U.S. 383, 389-91 (1981) (the privilege rests on the need for counsel to “know all that relates to the client’s reasons for seeking representation”; the privilege exists not just to protect the giving of legal advice, but “also the giving of information to the lawyer to enable him to give sound and informed advice”; the “first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant”); *United States v. Rowe*, 96 F.3d 1294, 1297 (9th Cir. 1996) (*Upjohn* “make[s] clear that fact-finding which pertains to legal advice counts as ‘professional legal services’”) (citation omitted); *In re Woolworth Corp. Sec. Class Action Litig.*, No. 94-CIV.2217 (RO), 1996 WL 306576, at \*1-2 (S.D.N.Y. June 7, 1996) (investigative notes and memoranda from law firm hired by company under investigation by the SEC held privileged under *Upjohn*); *United States v. Davis*, 131 F.R.D. 391, 398 (S.D.N.Y. 1990), *reh’g granted on procedural matter*, 131 F.R.D. 427 (S.D.N.Y. July 02, 1990) (the privilege “encompasses factual investigations by counsel”); *see also In re Allen*, 106 F.3d 582, 603 (4th Cir. 1997) (rejecting the legal theory that the attorney-client privilege did not apply simply because lawyer’s assigned duties were investigative in nature, court found privilege applicable because investigation was “related to the rendition of legal services”) (citation omitted).

outside research firm for the ostensible purpose of putting technical information concerning TRW's computerized credit reporting system into a form that lawyers could understand.<sup>57</sup> Although the proposal indicated that the research firm was hired "to advise TRW . . . on the status of its procedures under the Fair Credit Reporting Act," the court ultimately rejected TRW's assertion of attorney-client privilege because of an inadequate showing that the privilege requirements were met.<sup>58</sup>

### 5. Self-Evaluative Privilege

Despite judicial reluctance to fashion new privileges,<sup>59</sup> some lower courts have adopted a so-called "self-evaluative" or "self-critical analysis" privilege.<sup>60</sup> First announced in the 1970 case, *Bredice v. Doctors Hosp. Inc.*,<sup>61</sup> the self-evaluation privilege is designed to encourage parties to "engage in candid self-evaluation without fear that such criticism will later be used against them."<sup>62</sup> It is an elusive privilege, and one not broadly recognized by the courts. The self-evaluation privilege has been applied in hospital contexts,<sup>63</sup> employment discrimination cases,<sup>64</sup> government-obligated reports,<sup>65</sup> and in environmental

---

57. *Federal Trade Commission v. TRW*, 628 F.2d at 212-13.

58. *See id.*; *see also* *Simon v. G.D. Searle & Co.*, 816 F.2d 397 (8th Cir. 1987), *cert. denied*, 484 U.S. 917 (1987) (aggregate risk management documents, although based on privileged materials, were themselves not privileged because they were prepared mostly for business purposes); *United States v. Int'l Bus. Machs. Corp.*, 66 F.R.D. 206, 212-13 (S.D.N.Y. 1974) (although the process of giving legal advice involves incorporating "relevant nonlegal considerations," no privilege will attach if a document was prepared for purposes of simultaneous review by legal and non-legal personnel; in such a case, "it cannot be said that the primary purpose of the document is to secure legal advice") (citation omitted).

59. *See generally* *University of Pa. v. EEOC*, 493 U.S. 182 (1990) (acknowledging its authority to develop privilege rules under Rule 501, the court refused to create a new privilege against the disclosure of peer review materials).

60. *See generally* WRIGHT & MILLER, *FEDERAL PRACTICE & PROCEDURE* § 5431, at 835 (Supp. 2002) (collecting cases).

61. *Bredice v. Doctors Hosp. Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973) (minutes of hospital staff meetings regarding procedures to improve patient care could be protected from discovery in a malpractice suit because of the important public interest in having hospitals critically evaluate the quality of the care they provide).

62. *Reich v. Hercules, Inc.*, 857 F. Supp. 367, 371 (D.N.J. 1994).

63. *See Bredice*, 50 F.R.D. at 249.

64. *See, e.g., Hoffman v. United Telecomms., Inc.*, 117 F.R.D. 440, 443 (D. Kan. 1987) (statistical analysis regarding the compensation structure of defendant-employer's work force held privileged in a discrimination case). *But see Zapata v. IBP, Inc.*, No. CIV.A.93-2366-EEO, 1994 WL 649322 (D. Kan. Nov. 10, 1994) (offering a compelling argument that such material in the employment discrimination context should not be protected).

65. *See, e.g., Roberts v. Carrier Corp.*, 107 F.R.D. 678, 684 (N.D. Ind. 1985) (privilege protects "only those evaluations that the law requires one to make").

litigation.<sup>66</sup> Because some courts have invoked its protections, the self-evaluation privilege may serve an important alternative argument in support of non-disclosure of sensitive intra-corporate files.

In general, the party asserting the privilege must demonstrate that the material to be protected satisfies at least three criteria: (1) the information must result from a critical self-analysis undertaken by the party seeking protection; (2) the public must have a strong interest in preserving the free flow of the type of information sought; and (3) the information must be of the type whose flow would be curtailed if discovery were allowed.<sup>67</sup> In addition to these basic requirements, self-evaluative material must have been prepared with the expectation that it would be kept confidential and it must, in fact, have been confidential.<sup>68</sup>

## 6. Waiver of Attorney-Client Privilege

The attorney-client privilege is intended to encourage the client to share, with his/her attorney, information that is otherwise confidential.<sup>69</sup> When this privilege is waived, it is said that communications revealed to third parties lose their confidential nature,<sup>70</sup> or reflect a client's lack of intent to keep matters confidential.<sup>71</sup> In the interests of fairness and in furtherance of the adversarial system of justice, some communications may lose their privilege.<sup>72</sup>

Waiver of the attorney-client privilege is an important notion, especially in the context of internal company investigations. In its attempt to investigate and resolve misfeasance, the corporation, with the assis-

---

66. See *Reichhold Chems., Inc. v. Textron, Inc.*, 157 F.R.D. 522, 527 (N.D. Fla. 1994) (landowner was entitled to qualified privilege for environmental reports prepared after the fact for "purpose of candid self-evaluation and analysis of cause and effect of past pollution").

67. See *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 425-26 (9th Cir. 1992) (citing Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083, 1086 (1983)); *In re Salomon Inc. Sec. Litig.*, Nos. 91 CIV.5442 (RPP), 91 CIV.5471 (RPP), 1992 WL 350762, at \*4 (S.D.N.Y. 1992) (adopting the privilege but refusing to apply it to management control studies and internal audit reports because such material is not of the type whose flow would be curtailed if discovery were allowed).

68. *Dowling*, 971 F.2d at 426.

69. *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981).

70. See *Hardy v. New York News, Inc.*, 114 F.R.D. 633, 644-45 (S.D.N.Y. 1987).

71. See *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1424 (3d Cir. 1991); *In re Consol. Litig. Concerning Int'l Harvester's Disposition of Wis. Steel*, 666 F. Supp. 1148, 1157 (N.D. Ill. 1987) ("third party disclosures here further indicate that IH did not intend attorney-client communication . . . to remain confidential"); 8 J. WIGMORE, EVIDENCE § 2326, at 633 (McNaughton rev. ed. 1961).

72. See *In re Bairnco Corp. Sec. Litig.*, 148 F.R.D. 91, 99-100 (S.D.N.Y. 1993); *Commonwealth of Va. v. Edwards*, 370 S.E.2d 296, 301 (Va. 1988) (when a party's conduct "touches a certain point of disclosure, fairness requires that [the] privilege shall cease whether [the party] intended that result or not").

tance of its counsel, may invariably find itself making limited disclosures of internal investigations to the government, a court, the public, or third parties. Good faith disclosures to a government agency could, for example, end up in the hands of opposing counsel in a subsequent civil matter, thus forcing the corporation and its counsel to defend against assertions that the privilege was waived. There are several common ways in which the privilege can be waived:

a. Disclosure to Third Parties

The basic rule is that attorney-client communications that are disclosed to third parties, not for the purpose of assisting the attorney in rendering legal advice, lose their privilege.<sup>73</sup> Privilege-waiving disclosures to third parties can arise in a number of contexts, including disclosure of materials to: a client's underwriter and accountant;<sup>74</sup> a corporation's investment banker;<sup>75</sup> one's adversary in separate litigation,<sup>76</sup> even if under a confidentiality agreement;<sup>77</sup> and a witness in preparation for testimony.<sup>78</sup>

It should be noted that if counsel shares privileged information with a third party for the purpose of preparing a joint or common defense, then the privilege generally is not waived.<sup>79</sup> The so-called "joint defense" theory may allow counsel conducting an internal corporate investigation to disclose privileged communications to present and former employees, or other co-defendants and their attorneys, with-

---

73. *In re Consol. Litig. Concerning Int'l Harvester's Disposition of Wis. Steel*, 666 F. Supp. at 1156-57.

74. *See In re John Doe Corp.*, 675 F.2d 482 (2d Cir. 1982) (sharing portions of internal company investigation with accountant to resolve audit issues and with underwriter in connection with public offering waived attorney-client privilege and thus investigative materials could be produced to government); *see also* *United States v. El Paso Co.*, 682 F.2d 530, 540 (5th Cir. 1982), *cert. denied*, 466 U.S. 944 (1984) (finding that disclosure of tax pool analysis and underlying documentation to outside accountants for tax audit purposes waives attorney-client privilege); *In re Horowitz*, 482 F.2d 72, 80-82 (2d Cir. 1973), *cert. denied*, 414 U.S. 867 (1973) (holding that privilege was waived on disclosure to accountant).

75. *SEC v. Texas Int'l Airlines, Inc.*, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,945 (D.D.C. Aug. 03, 1979) (privilege waived on disclosure to investment banker to secure an independent, arm's-length opinion) (citation omitted).

76. *Chubb Integrated Sys. Ltd. v. Nat'l Bank of Wash.*, 103 F.R.D. 52, 67 (D.D.C. 1984).

77. *See Bowne of N.Y. City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 480 (S.D.N.Y. 1993) ("[E]ven if the disclosing party requires, as a condition of disclosure, that the recipient maintain the materials in confidence, this agreement does not prevent the disclosure from constituting a waiver of the privilege; it merely obligates the recipient to comply with the terms of any confidentiality agreement.") (citations omitted).

78. *See Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 397 (N.D. Cal. 1991) (concluding that "communications from counsel to a testifying expert are discoverable to the extent that they relate to matters about which the expert will testify").

79. *See Sobol v. E.P. Dutton, Inc.*, 112 F.R.D. 99, 104 (S.D.N.Y. 1986).

out sacrificing the confidentiality protections of the attorney-client privilege.<sup>80</sup> As one court explained it, the joint defense privilege is meant to recognize "the advantages of, and even, the necessity for, an exchange or pooling of information between attorneys representing parties sharing such a common interest in litigation, actual or prospective."<sup>81</sup>

#### b. Disclosure to a Government Agency

Waiver issues frequently arise in connection with the disclosure of investigative materials to government agencies such as the SEC, IRS, and the Environmental Protection Agency (EPA). In this context, a corporation must confront two issues: (1) whether the attorney-client privilege has been waived and (2) if waiver has occurred, whether disclosure of part of a privileged communication results in a waiver not only as to matters actually disclosed, but also to all other communications regarding the same subject matter.<sup>82</sup> Currently, there is a significant and widely recognized split among the federal courts as to whether disclosure of sensitive investigative information should result in a limited waiver (of material actually disclosed) or a broad waiver (of potentially every document related to the same subject matter of those materials actually disclosed).<sup>83</sup>

#### i. Limited Waiver Theory

The Eighth Circuit's *en banc* decision in *Diversified Industries v. Meredith*,<sup>84</sup> is a leading and widely cited case for the proposition that disclosure of investigative material to a federal agency should only result in a limited waiver of the attorney-client privilege. In *Diversified Industries*, the court held that compelled disclosure to the SEC of a corporate report describing a "slush fund" amounted to only a limited

---

80. See *In re Beville, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3d Cir. 1986) (requiring the party asserting the privilege to show that "(1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort, and (3) the privilege has not been waived") (citation omitted); *Sobol*, 112 F.R.D. at 104 (disclosure to a former employee, for purpose of preparing common defense, does not waive privilege); *Schachar v. American Acad. of Ophthalmology, Inc.*, 106 F.R.D. 187, 191 (N.D. Ill. 1985).

81. *Transmirra Prods. Corp. v. Monsanto Chem. Co.*, 26 F.R.D. 572, 579 (S.D.N.Y. 1960).

82. See, e.g., *First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co.*, 110 F.R.D. 557, 567-68 (S.D.N.Y. 1986); *Teachers Ins. & Annuity Ass'n of Am. v. Shamrock Broad. Co.*, 521 F. Supp. 638, 641 (S.D.N.Y. 1981); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1161-62 (D.S.C. 1974).

83. See *infra* notes 84-112 and accompanying text; see also Brian M. Smith, *Be Careful How You Use It or You May Lose It: A Modern Look at Corporate Attorney-Client Privilege and the Ease of Waiver in Various Circuits*, 75 U. DET. MERCY L. REV. 389, 402-10 (1998).

84. *Diversified Indus. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) (*en banc*).

waiver of the attorney-client privilege – limited in that the privilege would be deemed waived as to the government, but not as to private third parties.<sup>85</sup> The court refused to order the corporation to produce the report for inspection to private plaintiffs in pending civil litigation on the grounds that a contrary ruling could undermine corporate incentives to initiate counsel-conducted internal investigations.<sup>86</sup> Although its holding has been expressly adopted in some district courts,<sup>87</sup> *Diversified's* limited waiver theory is the minority view in the federal courts of appeals.<sup>88</sup>

At least one court has qualified the limited waiver approach. It suggested that a corporation might preserve the right to assert the privilege in subsequent proceedings if, at the time of disclosure, it took affirmative steps to preserve the privilege.<sup>89</sup>

## ii. Subject-Matter Waiver

The limited waiver approach, which a minority of courts has adopted, sharply contrasts with the majority rule, which effectively holds that disclosure to the government encompasses broad subject matter waiver as to third parties. Courts in the First,<sup>90</sup> Second,<sup>91</sup> Third,<sup>92</sup> Fourth,<sup>93</sup> and the D.C. Circuit,<sup>94</sup> have adopted broad subject-

---

85. *Id.* at 610-11.

86. *Id.* at 611.

87. *See, e.g.,* Byrnes v. IDS Realty Trust, 85 F.R.D. 679 (S.D.N.Y. 1980) (applying *Diversified's* limited waiver approach); *In re* Grand Jury Subpoena Dated July 13, 1979, 478 F. Supp. 368 (E.D. Wis. 1979) (same).

88. *Cf. In re* Grand Jury Proceedings Oct. 12, 1995, 78 F.3d 251, 255 (6th Cir. 1996) (owner and president of a laboratory waived attorney-client privilege as to several specific items of a marketing plan, but not as to the entire plan).

89. *See* Teachers Ins. & Annuity Ass'n. v. Shamrock Broad. Co., 521 F. Supp. 638, 642, 644-45 (S.D.N.Y. 1981) (holding that "disclosure to the SEC should be deemed to be a complete waiver of the attorney-client privilege" in favor of a third party "unless the right to assert the privilege in subsequent proceedings is specifically reserved at the time the disclosure is made"; court found broad waiver because party, in response to subpoena, tendered documents to SEC without objection). *But see In re* Subpoenas Duces Tecum, 738 F.2d, 1367, 1370 (D.C. Cir. 1984) (privilege waived by disclosure to SEC, despite statement in transmittal letter that documents were confidential and that their submission to the SEC was not a waiver of any privilege).

90. *United States v. Massachusetts Inst. of Tech.*, 129 F.3d 681 (1st Cir. 1997) (court found that university's prior disclosure of its billing and other records to the auditing wing of the U.S. Department of Defense waived the privilege as to those documents in a subsequent request by the IRS).

91. *See In re* Steinhardt Partners, L.P., 9 F.3d 230 (2d Cir. 1993) (finding that plaintiffs in a civil suit were entitled to a legal memorandum submitted to the SEC by Steinhardt in an attempt to forestall enforcement proceedings; because Steinhardt had voluntarily disclosed the memo to the SEC, the privilege was waived as to third party).

92. *See* Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414 (3d Cir. 1991) (voluntary disclosure of internal investigation report to the SEC and the Department of Justice during a bribery investigation waived privilege as to third party).



matter waiver rules. Each has held, under various formulations, that disclosure of confidential communications to governmental agencies constitutes a general broad-based waiver of the attorney-client privilege, and thus, such material can be made available to unrelated third parties.<sup>95</sup>

In *In re Sealed Case*, the District of Columbia Circuit Court of Appeals held that selective disclosure of the results of an internal corporate investigation to the SEC constituted a waiver of the attorney-client privilege with respect to the documents withheld.<sup>96</sup> *In re Sealed Case* involved an outside counsel's internal corporate investigation into possible illegal foreign payments and illegal political contributions.<sup>97</sup> Counsel submitted a final report to the SEC, along with notebooks containing the lawyers' notes of interviews and certain corporate records and documents.<sup>98</sup> The corporation did not disclose thirty-eight additional documents that were in the investigative files.<sup>99</sup> Subsequently, the grand jury subpoenaed the previously disclosed documents, as well as those remaining in counsel's investigative files.<sup>100</sup> The court cited three factors in support of its holding that the privilege had been waived with respect to the withheld documents: (1) the corporation's final report to the SEC emphasized that it was based on a review of all relevant files made available to counsel conducting the investigation; (2) the corporation had allowed the SEC to access its files and asserted that all relevant supporting documents were included, when in fact two of the documents in question had been removed; and (3) the documents in question were particularly significant because they impeached the official version of the report

---

93. See *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988) (disclosure of an internal report to the U.S. Attorney responding to allegations of fraud waived privilege and thus was discoverable by an indicted employee for use as a defense against charges arising out of same allegations).

94. See *In re Subpoenas Duces Tecum*, 738 F.2d 1367 (disclosure of final internal investigative report, underlying records, and lawyer notes to SEC waived privilege and thus could be made available to plaintiff-shareholders in a subsequent civil action); *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982) (disclosure of an internal investigative report to the SEC waived privilege and thus could be made available to the Grand Jury in a related matter); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981) (disclosure of documents to the SEC by company waived privilege as to these documents and thus were discoverable by the Department of Energy in an unrelated investigation).

95. See *Massachusetts Inst. of Tech.*, 129 F.3d 681; *In re Steinhardt Partners, L.P.*, 9 F.3d 230; *Westinghouse Elec. Corp.*, 951 F.2d 1414; *In re Martin Marietta Corp.*, 856 F.2d 619; *In re Subpoenas Duces Tecum*, 738 F.2d 1367; *In re Sealed Case*, 676 F.2d 793; *Permian Corp.*, 665 F.2d 1214.

96. *In re Sealed Case*, 676 F.2d at 825.

97. *Id.* at 801-02.

98. *Id.* at 801-03.

99. *Id.* at 804, 821.

100. *In re Sealed Case*, 676 F.2d at 804.

and cast doubt on its veracity.<sup>101</sup> The court further rejected the corporation's argument that disclosure would discourage voluntary corporate cooperation with the government; the court stated that the SEC, or any other government agency, could expressly agree to limitations on further disclosure consistent with their legal responsibilities.<sup>102</sup>

Similar to the D.C. Circuit, the Fourth Circuit, in *In re Martin Marietta Corp.*, held that a corporation's disclosure of privileged material submitted to the United States Attorney constituted waiver of the corporation's attorney-client privilege, even as to material withheld from disclosure.<sup>103</sup> Martin Marietta had conducted an internal investigation into alleged fraudulent accounting procedures related to contracts with the Department of Defense.<sup>104</sup> The company subsequently disclosed the results of its investigation to the United States Attorney in a Position Paper describing why the company should not face indictment.<sup>105</sup> A former employee indicted for conspiracy to defraud the Department of Defense sought disclosure, pursuant to Federal Rule of Criminal Procedure 17(c),<sup>106</sup> of the corporation's audit papers and witness statements generated during the investigation. In enforcing the former employee's subpoena, the court rejected the limited waiver doctrine and held that the privilege had been waived as to the undisclosed details underlying the published data.<sup>107</sup> However, the court afforded greater protection under the work product doctrine and remanded for a further determination of its applicability.<sup>108</sup>

There is no clear judicial consensus whether waiver as to third parties encompasses only that material which was disclosed to a government agency, or includes all related documents concerning the same

---

101. *Id.* at 817-22 (providing a discussion on the ground rules of the SEC's voluntary disclosure program, the express representation regarding the corporation's files, and the significance of the corporation's files for a fair evaluation).

102. *Id.* at 824.

103. *In re Martin Marietta Corp.*, 856 F.2d at 623-24.

104. *Id.* at 622.

105. *Id.* at 623.

106. As indicated by its title, this rule governs subpoenas of "Documentary Evidence and of Objects" and provides:

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

FED. R. CRIM. P. 17(c).

107. *In re Martin Marietta Corp.*, 856 F.2d at 623-24.

108. *Id.* at 624-27.

subject matter. The Fourth and D.C. Circuits have extended the waiver of the attorney-client privilege to include communications not disclosed, reasoning that the privilege "should be available only at the traditional price; a litigant who wishes to assert confidentiality must maintain genuine confidentiality."<sup>109</sup> Conversely, it has been held that disclosure of a final investigative report does not result in a waiver of the attorney-client privilege with respect to the underlying documentation for the report.<sup>110</sup> In truth, the determination of the scope of a waiver is nuanced and factual. As the Sixth Circuit observed, the rule that disclosure of some material results in disclosure of all material on the same subject matter is not determinative, because "subject matter can be defined narrowly or broadly."<sup>111</sup> "We are thus persuaded," the court noted, "by the line of cases that try to make prudential distinctions between what was revealed and what remains privileged."<sup>112</sup>

### c. Placing Communications At Issue

Another frequently litigated question is 'at issue' waiver. Asserting a claim or defense that puts at issue otherwise confidential communications waives the attorney-client privilege as to those communications. This waiver issue may arise in a number of contexts.

---

109. *Permian Corp.*, 665 F.2d at 1222; see also *R. J. Hereley & Son Co. v. Stotler & Co.*, 87 F.R.D. 358, 359 (N.D. Ill. 1980) (discussing how "it is well-settled that voluntary disclosure of a portion of a privileged communication constitutes a waiver with respect to the rest of the communication on the same subject") (citing *Securities & Exch. Comm'n v. Dresser Indus., Inc.*, 453 F. Supp. 573 (D.D.C. 1978)).

110. See *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 25 (9th Cir. 1981) (finding waiver "only as to communications about the matter actually disclosed"); *Schenet v. Anderson*, 678 F. Supp. 1280, 1284 (E.D. Mich. 1988) ("The privilege is waived only as to those portions of the preliminary drafts ultimately revealed to third parties."); *United States v. Lipshy*, 492 F. Supp. 35, 43-44 (N.D. Tex. 1979); *In re Grand Jury Subpoena Dated July 13, 1979*, 478 F. Supp. 368, 372-73 (E.D. Wis. 1979) (disclosure of independent counsel's report to the SEC, state grand jury, and IRS did not result in waiver of underlying documentation).

111. *In re Grand Jury Proceedings* Oct. 12, 1995, 78 F.3d 251, 255 (6th Cir. 1996).

112. *Id.* at 255-56 (citing *inter alia: In re Sealed Case*, 877 F.2d at 981 ("remanding district court decision finding company waived privilege on six documents by inadvertently disclosing one of the documents because lower court 'did not fully explain why the communications were related'"); *United States v. (Under Seal)*, 748 F.2d 871, 875 n.7 (4th Cir. 1984) ("If any of the non-privileged documents contain client communications not directly related to the published data, those communications, if otherwise privileged, must be removed by the reviewing court before the document may be produced."); *United States v. Cote*, 456 F.2d 142, 145 n.4 (8th Cir. 1972) (requiring in camera review of documents to protect information not already published, for "[t]oo broad an application of the rule of waiver requiring unlimited disclosure . . . might tend to destroy the salutary purpose of the privilege").

i. Disclosure of Special Litigation Committee Reports

In response to a shareholder derivative action, a corporation may engage outside counsel to conduct an internal investigation under the direction of a special litigation committee.<sup>113</sup> In certain circumstances, the court may grant the corporation's motion to terminate the derivative action based upon the report of the special litigation committee.<sup>114</sup> To the extent a corporation affirmatively relies on the committee's report, courts may deem the attorney-client privilege waived and order the report disclosed.<sup>115</sup>

ii. Advice-of-Counsel Defense

The attorney-client privilege may also be waived when the client asserts claims or defenses that put the attorneys' advice at issue in the litigation.<sup>116</sup> For example, a party seeking to assert, as a defense against a claim of willful patent infringement, the fact that they relied on the advice of counsel, and thus did not act willfully, will be found to have waived the privilege.<sup>117</sup> One widely-cited case in this area holds that, in order for the privilege to be waived, the waiving party must take some "affirmative act" to put the protected information at issue: waiver of the privilege is therefore proper – and disclosure of the material is appropriate – because concealment would deny the opposing party access to information vital to its defense.<sup>118</sup> The fact that a party asserts a defense that will make an attorney's advice relevant does not waive the privilege. Rather, the advice of counsel "is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney-client communication."<sup>119</sup>

---

113. See generally Charles W. Murdock, *Corporate Governance—The Role of Special Litigation Committees*, 68 WASH. L. REV. 79, 86-88 (1993).

114. *Id.*

115. See *In re Perrigo Co.*, 128 F.3d 430 (6th Cir. 1997) (committee report ordered disclosed to derivative plaintiffs but not to public); *In re Cont'l Illinois Sec. Litig.*, 732 F.2d 1302, 1314 (7th Cir. 1984) (report ordered disclosed to a newspaper reporting on the litigation); *Joy v. North*, 692 F.2d 880, 893-94 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983) (holding report and supporting documentation must be disclosed to shareholders). See generally Jerold S. Solovy & Barry Levenstam, *Special Litigation Committees*, 9 A.L.I.-A.B.A. COURSE MATERIALS J. 5 (Apr. 1985).

116. See *Garcia v. Zenith Elecs. Corp.*, 58 F.3d 1171, 1175 n.1 (7th Cir. 1995).

117. See, e.g., *Soloman v. Kimberly-Clark Corp.*, No. 98 C 7598, 1999 WL 89570, at \*2 (N.D. Ill. Feb. 12, 1999) (assertion of advice of counsel defense results in waiver of the attorney-client privilege and attorney work product protection) (citing cases); *Dawson v. New York Life Ins. Co.*, 901 F. Supp. 1362, 1369-70 (N.D. Ill. 1995) (assertion of advice of counsel defense to claim to violation of FLSA resulted in waiver of privilege as to certain discovery).

118. See *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975).

119. *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994).

### iii. Reasonable Remedial Acts by Employer Defense

The assertions of a corporation that, in response to allegations of work-place harassment or discrimination, it has implemented reasonable remedial or compliance programs may, in some cases, constitute waiver of the attorney-client privilege. This issue arises when the corporation directs its counsel to conduct an internal investigation into allegations of impropriety, and then, based on the investigative report, the corporation asserts that it has taken appropriate remedial measures.<sup>120</sup> This issue of waiver through the assertion of reasonable remediation efforts has become more pronounced in light of recent Supreme Court holdings where, in cases of supervisor harassment within Title VII of the 1964 Civil Rights Act,<sup>121</sup> the employer may escape liability if it can show: (1) it exercised reasonable care to prevent and promptly correct the supervisor's sexual harassment and (2) the victim unreasonably failed to take advantage of any corrective or preventive opportunities, that the employer provided, or to otherwise avoid harm.<sup>122</sup> Thus, the corporation may find itself defending against waiver of privilege arguments to the extent it bases its "reasonable response" defense on an attorney-directed internal investigation. When such an internal investigation is used to affirmatively plead this defense, "the adequacy of the employer's investigation becomes critical to the issue of liability."<sup>123</sup> Thus, the only way the plaintiff "can determine the reasonableness of the [employer's] investigation is through full disclosure of the [report's] contents."<sup>124</sup> One court has held that both the attorney-client privilege and the work product doctrine were waived where the employer, based in part on an outside counsel's report, asserted the affirmative defense that it took effective remedial action and that the plaintiff's alleged conduct was welcomed.<sup>125</sup>

---

120. See, e.g., *McGrath v. Nassau County Health Care Corp.*, 204 F.R.D. 240, 245-46 (E.D.N.Y. 2001).

121. 42 U.S.C. § 2000(e) *et seq.*

122. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998). This defense, available to employers in the employment context, is sometimes referred to as the "*Ellerth/Faragher* affirmative defense." See, e.g., *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595, 598 (8th Cir. 1999).

123. *Brownell v. Roadway Package Sys., Inc.*, 185 F.R.D. 19, 25 (N.D.N.Y. 1999).

124. *McGrath*, 204 F.R.D. at 248 (outside counsel's internal investigative report into allegations of sexual harassment supported employer's affirmative defense that it exercised reasonable care to prevent and correct sexual harassment; such reliance waived attorney-client privilege and report ordered disclosed to plaintiff).

125. See *Worthington v. Endee*, 177 F.R.D. 113, 118 (N.D.N.Y. 1998).

#### d. Crime – Fraud Waiver

The attorney-client privilege will not apply where legal advice has been obtained in furtherance of an illegal or fraudulent act.<sup>126</sup> To establish the crime – fraud exception, the party that is seeking discovery need only establish a prima facie showing that the advice was obtained in furtherance of an illegal or fraudulent act.<sup>127</sup> The party need not show that a crime or fraud occurred; it is sufficient that a crime or fraud was the objective of the communication.<sup>128</sup> A party that is seeking discovery must come forward with at least some evidence that, if believed, would establish the elements of an ongoing or imminent crime or fraud.<sup>129</sup> However, an attorney's ignorance of his client's purpose is irrelevant.<sup>130</sup>

#### B. Work Product Doctrine

In addition to the attorney-client privilege and to a limited extent, the self-evaluation privilege, the work product doctrine also protects the confidentiality of materials related to an internal corporate investigation. Federal Rule of Civil Procedure 26(b)(3), codifying the work product doctrine as enunciated in *Hickman v. Taylor*,<sup>131</sup> defines the elements of the work product doctrine in the federal courts.<sup>132</sup> In relevant part, Rule 26(b)(3) states that:

[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclu-

---

126. *In re Antitrust Grand Jury*, 805 F.2d 155, 162 (6th Cir. 1986); see also *In re Grand Jury Subpoenas Duces Tecum*, 773 F.2d 204, 206 (8th Cir. 1985).

127. *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985).

128. *In re Grand Jury Subpoena Duces Tecum Dated Sept. 18, 1983*, 731 F.2d 1032, 1039 (2d Cir. 1984).

129. *In re Sealed Case*, 754 F.2d at 399; see also *In re Antitrust Grand Jury*, 805 F.2d 155 (requiring a showing of probable cause).

130. *In re Sealed Case*, 754 F.2d at 402; *United States v. Horvath*, 731 F.2d 557, 562 (8th Cir. 1984).

131. *Hickman v. Taylor*, 329 U.S. 495 (1947).

132. FED. R. CIV. P. 26(b)(3).

sions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.<sup>133</sup>

Thus, the work product doctrine, which applies equally in criminal prosecutions,<sup>134</sup> shields: (1) documents or tangible things prepared in anticipation of litigation or for trial; (2) by or for another party or that party's representative; (3) unless the party seeking discovery demonstrates both substantial need for those materials and it is unable, without undue hardship, to obtain the equivalent of those materials.<sup>135</sup> Similar to the attorney-client privilege, the work product doctrine will not prevent an adversary from obtaining information from a witness or independent source simply because that information was disclosed earlier to counsel, or is contained in a document not otherwise discoverable.<sup>136</sup>

The purpose behind the work product doctrine is to "preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy with an eye toward litigation, free from unnecessary intrusion by his adversaries."<sup>137</sup> The *Hickman* court explained that, without protection for a lawyer's work product, "much of what is now put down in writing would remain unwritten," undermining the efficiency, fairness, and sharpness of the adversarial system.<sup>138</sup>

In structuring an internal corporate investigation, counsel must consider from the outset both the policy and the requirements underlying the work product doctrine in order to more effectively utilize its protections. The three elements to the work product doctrine are examined below.

### 1. Anticipation of Litigation

In order for the work product protections to attach, materials must have been prepared in anticipation of litigation, even if the litigation concerns an unrelated matter.<sup>139</sup> Materials prepared with only a re-

---

133. *Id.*

134. See *United States v. Nobles*, 422 U.S. 225, 236 (1975); FED. R. CRIM. P. 16(b)(2).

135. FED. R. CIV. P. 26(b)(3).

136. See FED. R. CIV. P. 26(b)(3) advisory committee's note (stating that "No change is made in the existing doctrine, noted in the *Hickman* case, that one party may discover relevant facts known or available to the other party, even though such facts are contained in a document which is not itself discoverable.").

137. *United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir. 1998) (citing *Hickman*, 329 U.S. at 510-11); see also *In re Foster*, 188 F.3d 1259, 1272 (10th Cir. 1999).

138. *Hickman*, 329 U.S. at 393-94.

139. See, e.g., *In re Murphy*, 560 F.2d 326, 335 (8th Cir. 1977); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480, 484-85 & n.15 (4th Cir. 1973); *Panter v. Marshall Field & Co.*, 80 F.R.D. 718, 724 (N.D. Ill. 1978); *Eagle-Picher Indus., Inc. v. United States*, 11 Cl. Ct., 452, 457 (1987). In some jurisdictions, this is still an outstanding issue. See *In re Grand Jury Proceed-*

remote possibility of, or mere speculation as to, future litigation generally will not be protected.<sup>140</sup> The question whether documents were so prepared is inherently a factual question, and the courts will look to see that the materials were prepared “because of” a litigation need (in which case materials would be protected), and not merely prepared as part of the normal course of a corporation’s business (in which case materials would be without protection).<sup>141</sup> A leading treatise succinctly put it:

The test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.<sup>142</sup>

Courts construe this requirement strictly, as one court put it:

[The] mere fact that litigation does eventually ensue does not, by itself, cloak materials with the work product privilege; the privilege is not that broad. Rather, we look to whether in light of the factual context the document can fairly be said to have been prepared or obtained *because* of the prospect of litigation.<sup>143</sup>

Therefore, it is critical that corporate counsel document the legal nature of his or her involvement in the investigation. To the extent the court views counsel’s involvement in an investigation as business – and not legal – in nature, the materials that counsel has generated risk losing the protection of the work product doctrine.<sup>144</sup>

---

ings, 604 F.2d 798, 803-04 (3d Cir. 1979) (while observing that work product doctrine should only apply to closely related subsequent litigation, the court declined to expressly so hold); *see also In re Grand Jury Proceedings*, 43 F.3d 966, 971 (5th Cir. 1994) (recognizing two approaches—i.e., applying the doctrine to subsequent related or unrelated litigation—and refusing to choose between the two).

140. *See In re Special Sept. 1978 Grand Jury (II)*, 640 F.2d 49, 65 (7th Cir. 1980).

141. *See, e.g., Broadnax v. ABF Freight Sys., Inc.*, 180 F.R.D. 343, 346 (N.D. Ill. 1998) (expressing the work product doctrine in terms of “causation”: “production of the materials must be caused by the anticipation of litigation. If materials are produced in the ordinary and regular course of a discovery opponent’s business, and not to prepare for litigation, they are outside the scope of the work product doctrine.”) (internal citations omitted).

142. 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2024, at 198-99 (1970) (footnotes omitted).

143. *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 976-77 (7th Cir. 1996) (internal citations, quotation marks, and ellipses omitted).

144. *See Logan*, 96 F.3d at 977 (investigative materials prepared “in the ordinary course of business as a precaution for the ‘remote prospect of litigation’” are not protected, while “materials prepared because [of] ‘some articulable claim, likely to lead to litigation’” are protected) (citation omitted); *see also Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir. 1987), *cert. denied*, 484 U.S. 917 (1987) (risk management documents and the aggregate case reserve information contained therein were not prepared for the purposes of litigation; such documents were



Although it is not always easy to determine whether the “anticipation of litigation” requirement has been met, it has been held that in the context of a regulatory agency’s investigations, there exists not just the “mere possibility of future litigation,” but “reasonable grounds for anticipating litigation.”<sup>145</sup> Thus, where corporate investigations are conducted to specifically address allegations of corporate misconduct, courts seem more willing to construe materials generated from the investigative process as predicates to litigation, even though litigation may not ultimately ensue.

The more serious the allegations, the greater the likelihood that litigation will result, and the more likely a court will find materials generated therein as being protected under the work product doctrine. In *In re Grand Jury Investigation*, the investigation concerned possible criminal wrongdoing. In ruling that the work product doctrine applied, the Third Circuit observed that in the context of the ongoing criminal investigation, “litigation of some sort [is] almost inevitable. The most obvious possibilities include criminal prosecutions, derivative suits, securities litigation, or even litigation by Sun to recover the illegal payments.”<sup>146</sup> The court distinguished other cases that dealt with the discoverability of internal IRS memoranda prepared during the investigative and settlement phases of a tax audit – situations where litigation was not very likely.<sup>147</sup> Some courts have refused to find that investigative materials were generated in anticipation of litigation, even though the investigation could have resulted in litigation.<sup>148</sup> However, as the preceding discussion suggests, material

---

“business planning documents,” and did “not enhance[ ] the defense of any particular lawsuit”); *Disidore v. Mail Contractors of Am., Inc.*, 196 F.R.D. 410, 414 (D. Kan. 2000) (although insurance company hired attorney to conduct claims investigation, it failed to prove that investigative materials were generated in anticipation of a lawsuit).

145. *Garrett v. Metro. Life Ins. Co.*, No. 95 CIV.2406, 1996 WL 325725, at \*3 (S.D.N.Y. June 12, 1996); see also *In re Grand Jury Subpoena*, 599 F.2d 504, 511 & n.5 (2d Cir. 1979) (investigation of possible illegal foreign payments); *In re Grand Jury Investigation*, 599 F.2d 1224, 1229 (3d Cir. 1979) (same); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 612 (N.D. Tex. 1981) (investigation in response to an SEC subpoena); *United States v. Lipshy*, 492 F. Supp. 35, 44-45 (N.D. Tex. 1979) (in-house investigation of political payments); cf. *Upjohn Co. v. United States*, 449 U.S. 383, 399 (1981) (government conceded applicability of the work product doctrine to documents prepared in the course of an internal corporate investigation). But see *Litton Sys., Inc. v. AT&T Co.*, 27 Fed. R. Serv. 2d (Callaghan) 819 (S.D.N.Y. 1979) (court held that interview memoranda from in-house counsel’s investigation of suspected bribes and unfounded “finder’s fees” in the corporation’s sales department only presented a “remote possibility” of litigation and therefore no work product immunity attached).

146. *In re Grand Jury Investigation*, 599 F.2d at 1229.

147. *Id.*

148. See *Diversified Indus. v. Meredith*, 572 F.2d 596, 604 (8th Cir. 1978) (“Law Firm’s work was not done in preparation for any trial, and we do not think that the work was done in ‘anticipation of litigation,’ as that term is used in Rule 26(b)(3), although, of course, all parties con-

generated during the course of an internal investigation – so long as that material is produced because of, or with an eye toward, litigation – will be protected under the work product doctrine.

## 2. Documents Prepared By A Party, His Attorney, Or His Representative

The work product doctrine protects materials that others, besides counsel, have prepared at counsel's request.<sup>149</sup> As a result, non-attorneys may be involved in the creation of protected work product. As the advisory committee notes to Rule 26(b)(3) make clear, the work product doctrine extends "not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf."<sup>150</sup> There are some cases that have limited the work product protection to materials prepared by, or at the direction of, an attorney.<sup>151</sup> However, the clear trend, consistent with the language and intent of Rule 26(b)(3), is that materials need not have been prepared by, or under the direction of, counsel in order to constitute work-product.<sup>152</sup>

## 3. Substantial Need and Undue Hardship

The work product doctrine provides only a qualified protection of confidentiality: if the party requesting the material has a substantial need for the information and cannot obtain the substantial equivalent without undue hardship, a court can order disclosure of the mate-

---

cerned must have been aware that the conduct of employees of Diversified in years past might ultimately result in litigation of some sort in the future."); *see also In re Kidder Peabody Sec. Litig.*, 168 F.R.D. 459, 465-67 (S.D.N.Y. 1996) (notes and memoranda of interviews conducted by outside counsel during a much publicized SEC investigation were not created "principally" for litigation, but as a business and public relations strategy).

149. *See United States v. Nobles*, 422 U.S. at 239 n.13; FED. R. CIV. P. 26(b)(3) advisory committee's note; *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235 (5th Cir. 1982) (protecting as privileged communications between auditors and attorneys).

150. FED. R. CIV. P. 26(b)(3) advisory committee's note to 1970 amendments.

151. *See, e.g., In re Six Grand Jury Witnesses*, 979 F.2d 939 (2d Cir. 1992) (work-product immunity does not protect information concerning analyses prepared by employees at the direction of corporation counsel, although it protects communications to counsel about those analyses); *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367, 372 (N.D. Ill. 1972) (in order to be work-product, materials must have been authored after consultation with attorney); *see also United States v. Lockheed Martin Corp.*, 995 F. Supp. 1460 (M.D. Fla. 1998) (materials relating to internal audit performed by in-house auditor after issues arose concerning accounting on government contract were not protected as work product).

152. *See APL Corp. v. Aetna Cas. & Surety Co.*, 91 F.R.D. 10 (D. Md. 1980) (to the extent documents are assembled by or for a party or his representatives into a meaningful product, the contents of that assemblage is work-product sheltered from disclosure).

rial.<sup>153</sup> However, the law, consistent with *Hickman* and Rule 26(b)(3), recognizes a distinction between materials that do not reveal any of the attorney's mental processes ("ordinary work product") and materials that reveal the opinions, conclusions, and mental impressions of the attorney ("opinion work product").<sup>154</sup> Recorded witness statements are examples of ordinary work product; an attorney's notes of an oral interview or a memorandum analyzing the situation are examples of opinion work product. For policy reasons, opinion work product receives greater protection from disclosure than ordinary work product.<sup>155</sup>

#### a. Ordinary Work Product

With regard to ordinary work product, courts have reached varied conclusions when interpreting the substantial need and undue hardship requirements.<sup>156</sup> A review of these decisions reveals that the determination of need and undue hardship depends largely on the facts in each case. Relevant circumstances include: (1) the nature of the materials requested; (2) the effort involved in composing or assembling the materials; (3) the potential for alternate sources of information; (4) the importance of the materials in relation to the issues at hand; and (5) the procedural posture in which the claim arises.<sup>157</sup> From the perspective of counsel conducting an internal corporate investigation, these factors introduce uncertainties with regard to the applicability of the work product doctrine.

#### b. Opinion Work Product

In contrast to the protection accorded ordinary work product, opinion work product is discoverable, if at all, only upon a showing of

---

153. See FED. R. CIV. P. 26(b)(3).

154. See *Upjohn Co. v. United States*, 449 U.S. 383, 399-402 (1981); *Hickman v. Taylor*, 329 U.S. 495, 511-13 (1947); *In re Grand Jury Subpoena*, 599 F.2d 504, 512-13 (2d Cir. 1979).

155. See *Upjohn*, 449 U.S. at 401.

156. See, e.g., *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1240 (5th Cir. 1982) (witness' present lack of recollection sufficient to establish substantial need); *United States Amerada Hess Corp.*, 619 F.2d 980, 988 (3d Cir. 1980) (avoidance of time and effort held sufficient to justify disclosure of a list of interviewees during internal investigation); *In re Grand Jury Subpoena*, 599 F.2d 504, 512 (2d Cir. 1979) (government's desire to examine questionnaires and interview memoranda in order to decide whether to offer immunity did not constitute sufficient need); *Panther v. Marshall Field & Co.*, 80 F.R.D. 718, 725 (N.D. Ill. 1978) (death of witness held sufficient to require immunity did not constitute sufficient need); *Panther*, 80 F.R.D. at 725 (death of witness held sufficient to require production of work product); *In re Grand Jury Proceedings*, 73 F.R.D. 647, 653-54 (M.D. Fla. 1977) (citing grand jury's authority and need to investigate, court held that materials prepared in anticipation of prior litigation must be produced in response to grand jury subpoena).

157. See *supra* note 156.

extraordinary need. Although the Supreme Court in *Upjohn* declined to decide whether opinion work product should receive absolute protection from disclosure,<sup>158</sup> the current trend is to view opinion work product as absolutely protected, barring "very rare and extraordinary circumstances,"<sup>159</sup> such as when the attorney has engaged in illegal conduct or fraud.<sup>160</sup>

#### 4. Waiver of Work Product Protection

Due to the differences in purpose between the attorney-client privilege and the work product doctrine, the standards for their waiver differ slightly. Therefore, an analysis of waiver of work product must be made with reference to the doctrine's underlying purpose, which is to protect material from an adversary in litigation. In light of this purpose, disclosure to a third party will not waive the work product privilege, "unless such disclosure, under the circumstances, is inconsistent with the maintenance of secrecy from the disclosing party's adversary."<sup>161</sup> Waiver of work product will occur to the extent disclosure "substantially increases" the possibility of an opposing party obtaining the information.<sup>162</sup> Thus, disclosures to non-adversaries made in the course of trial preparation should be allowed without waiver of the privilege. In other words, "while the mere showing of a voluntary disclosure to a third person will generally suffice to show waiver of the attorney-client privilege, it should not suffice in itself for waiver of the work product privilege."<sup>163</sup>

---

158. *Upjohn*, 449 U.S. at 401.

159. *Chaudhry v. Gallerizzo*, 174 F.3d 394, 403 (4th Cir. 1999); *Williamson v. Moore*, 221 F.3d 1177, 1182 (11th Cir. 2000); *Baker v. Gen. Motors Corp.*, 209 F.3d 1051, 1054 (8th Cir. 2000); *Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir.), *cert. denied*, 474 U.S. 903 (1985); *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1240 (5th Cir. 1982); *In re Sealed Case*, 676 F.2d 793, 809-10 (D.C. Cir. 1982); *see also In re Grand Jury Proceedings*, 412 F. Supp. 943, 949 (E.D. Pa. 1976) (opinion work product unqualifiedly and absolutely protected from disclosure).

160. *GAF Corp. v. Eastman Kodak Co.*, 85 F.R.D. 46, 51-52 (S.D.N.Y. 1979) (citing 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 2024, at 198-99 (1970)); *see also Minnesota Sch. Bds. Ass'n Ins. Trust v. Employers Ins. Co.*, 183 F.R.D. 627, 631 (N.D. Ill. 1999) ("A waiver only occurs, however, if the disclosure to a third party is inconsistent with the maintenance of secrecy from the disclosing party's adversary.") (citation and internal quotations omitted).

161. *GAF Corp.*, 85 F.R.D. at 52; *see also Behnia v. Shapiro*, 176 F.R.D. 277, 279 (N.D. Ill. 1997).

162. *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980); *see also In re Sealed Case*, 676 F.2d at 809 ("The work product privilege protects both the attorney-client relationship and a complex of individual interests particular to attorneys that their clients may not share. And because it looks to the vitality of the adversary system rather than simply seeking to preserve confidentiality, the work product privilege is not automatically waived by any disclosure to a third party.").

163. *American Tel. & Tel. Co.*, 642 F.2d at 1299.

In general, no waiver will result if information is shared with another party who possesses a "common interest" – one who anticipates litigation against a common adversary on the same issue or issues.<sup>164</sup> In cases where work product is shared with, or disclosed to, a party with a "common interest," waiver of work product has not been found.<sup>165</sup> The same waiver analysis applies in the context of work product disclosures to governmental agencies. In *Permian Corp. v. U.S.*, a case involving the transfer of work product to the SEC pursuant to an inquiry into the adequacy of a company's registration statement for a proposed share exchange, the court affirmed the district court in finding no waiver as to certain documents.<sup>166</sup> The *Permian* court held that, under the circumstances, the disclosure to the SEC was not adversarial, but was done pursuant to a confidentiality agreement to assist the SEC with its review.<sup>167</sup> By contrast, waiver was found in *In re Subpoenas Duces Tecum*, where disclosure of documents to the SEC was to persuade the SEC not to engage in a formal investigation of possible wrongdoings.<sup>168</sup>

In addition to disclosures to adversaries, the protections of the work product doctrine also may be waived through the testimonial use of work product documents during a deposition,<sup>169</sup> or during trial.<sup>170</sup>

When waiver of work product protection is found, courts must decide on the scope of the waiver. Unlike waiver of the attorney-client privilege, which often results in the waiver of all communications on

---

164. See *Castle v. Sangamo Weston, Inc.*, 744 F.2d 1464, 1466 (11th Cir. 1984); *In re Circle K Corp.*, Nos. 96 CIV.5801 (JFK), 96 CIV.6479 (JFK), 1997 WL 31197, at \*10 (S.D.N.Y. Jan. 28, 1997).

165. *Permian Corp. v. United States*, 665 F.2d 1214, 1217-20 (D.C. Cir. 1981).

166. *Id.* at 1214.

167. *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1372-73 (D.C. Cir. 1984) ("There is no question that the SEC was an adversary to Tesoro. This was not a partnership between allies. Tesoro was not simply assisting the SEC in doing its job. Rather, Tesoro independently and voluntarily chose to participate in a thorough disclosure program, in return for which it received the quid pro quo of lenient punishment for any wrongdoings exposed in the process. That decision was obviously motivated by self-interest." *Id.* at 1372.).

168. See *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 146 (D. Del. 1982) ("The binder at issue contains various documents selected and arranged by plaintiff's counsel and given to various witnesses prior to their depositions. Without reviewing those binders defendants' counsel cannot know or inquire into the extent to which the witnesses testimony has been shaded by counsel's presentation of the factual background. . . . Plaintiff's counsel made a decision to educate their witnesses by supplying them with the binders, and the Raytheon defendants are entitled to know the content of that education.").

169. See *United States v. Nobles*, 422 U.S. 225, 236-40 (1970); *Coleco Indus., Inc. v. Universal City Studios*, 110 F.R.D. 688 (S.D.N.Y. 1986).

170. As the court in *Martin Marietta Corp.* observed, broad, subject-matter waiver does not extend to materials protected by opinion work product. *Martin Marietta Corp.*, 856 F.2d 619, 625-26 (4th Cir. 1988); see also *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1422-23 (11th Cir. 1994) (same).

the same subject matter, waiver of work product material is generally limited to those documents that are actually disclosed.<sup>171</sup> However, some courts, invoking fairness principles, have found waiver not only with regards to disclosed materials, but also to undisclosed related materials.<sup>172</sup>

### 5. Crime-Fraud Exception

Similar to the crime-fraud exception to the attorney-client privilege, no protection of confidentiality is accorded to work product completed in furtherance of a crime or fraud.<sup>173</sup> However, unlike the waiver rule applied to the attorney-client privilege, an attorney's knowledge of the crime or fraud is relevant in the context of work product protection.<sup>174</sup> Thus, if the attorney is ignorant of the crime or fraud, work product protection is waived only as to information furnished to the attorney and not as to his mental impressions, conclusions, opinions or legal theories.<sup>175</sup>

## III. ANALYSIS

In light of the myriad and often conflicting decisional law of the federal courts, corporations must possess a thorough understanding of both attorney-client privilege and work product doctrine to more effectively facilitate internal investigations. To this end, Part A examines the interrelationship between these two doctrines. Part B clarifies the importance of confidentiality in the corporate environment.

### A. *The Interrelationship Between the Attorney-Client Privilege and Work Product Doctrine*

In order to take full advantage of the protections of the attorney-client privilege and the work product doctrine, counsel conducting an internal corporate investigation must be aware of their respective underlying rationales. The attorney-client privilege exists to protect the

---

171. See *In re Sealed Case*, 676 F.2d at 818 (broad subject matter waiver found where "acceptable tactics . . . degenerate[d] into 'sharp practices' inimical to a healthy adversary system"); see also *Gen. Foods Corp. v. Nestle Co.*, 218 U.S. P.Q. 812, 815 (D.N.J. 1982).

172. See *In re Antitrust Grand Jury*, 805 F.2d 155, 162-64 (6th Cir. 1986); *In re Sealed Case*, 676 F.2d at 811-13; *In re John Doe Corp.*, 675 F.2d 482, 492 (2d Cir. 1982).

173. See *In re Antitrust Grand Jury*, 805 F.2d at 164; *In re Special Sept. 1978 Grand Jury* (II), 640 F.2d 49, 63 (7th Cir. 1980).

174. See *In re Antitrust Grand Jury*, 805 F.2d at 164; *In re Special Sept. 1978 Grand Jury* (II), 640 F.2d at 62-63.

175. See *In re Antitrust Grand Jury*, 805 F.2d at 164; *In re Special Sept. 1978 Grand Jury* (II), 640 F.2d at 63.

confidentiality of communications between client and counsel; it is designed to encourage the full and candid disclosure of relevant information.<sup>176</sup> In contrast, the work product doctrine promotes the adversarial nature of our justice system by safeguarding the fruits of an attorney's trial preparation from the discovery attempts of his/her opponents.<sup>177</sup> The purpose of the work product doctrine is to protect information from disclosure to opposing parties, rather than to all others outside a particular confidential relationship.<sup>178</sup>

In accordance with these underlying objectives, the attorney-client privilege affords absolute protection against disclosure of confidential communications between a client and his/her attorney, while the work product doctrine provides only a qualified protection to the fruits of an attorney's efforts with regard to all aspects of a given case, even those outside the scope of confidential client communications.<sup>179</sup> Stated more simply, the attorney-client privilege provides absolute protection for a limited class of communications; the work product doctrine provides qualified protection to a potentially broader class of communications and documents.<sup>180</sup>

If one possesses an understanding of the doctrines' slightly different rationales, it is possible to better appreciate the case law that may, at the same time, uphold one doctrine and reject the other. For example, a corporation may lose on a privilege claim but win on work product, or vice versa. In *In re Martin Marietta Corp.*, the court held that, despite waiver of the attorney-client privilege, the corporation's decision to disclose the results of an internal investigation to the government did not constitute waiver of the protection for opinion work product.<sup>181</sup> In *Carter-Wallace, Inc. v. Hartz Mountain Indus., Inc.*,<sup>182</sup> the defendant corporation lost on its ordinary work product argument, and was forced to turn over the factual findings of an investigation. However, the corporation prevailed with respect to attorney-client privilege and opinion work product materials, namely employee interviews and counsel's written legal conclusions.<sup>183</sup>

To the extent state law bears on the matter, such as those instances when a federal court, sitting in diversity, must apply state law to attor-

---

176. See *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980).

177. *Id.*

178. *Id.* at 1298-99 (noting that the purpose of the work product doctrine is to "protect material from an opposing party in litigation, not necessarily from the rest of the world generally").

179. *Id.*

180. See *In re Sealed Case*, 676 F.2d 793, 808-09, 812 n.72 (D.C. Cir. 1982).

181. *In re Martin Marietta Corp.*, 856 F.2d 619, 625-26 (4th Cir. 1988).

182. *Carter-Wallace, Inc. v. Hartz Mountain Indus.*, 553 F. Supp. 45, 50-51 (S.D. N.Y. 1982).

183. *Id.* at 51.

ney-client disputes, judicial outcomes can be equally perplexing. In *Connolly Data Sys. v. Victor Technologies, Inc.*,<sup>184</sup> the court held that the attorney-client privilege, under California law, did not apply to communications with a corporate client's former employee. At the same time, the court held that, under Federal Rule 26(b)(3), these communications were protected from disclosure under the work product doctrine.<sup>185</sup> In *dicta*, the court noted that if federal law had applied to the attorney-client issue, the communications with former employees would have been protected under governing Ninth Circuit law.<sup>186</sup>

In order to come within the requirements of both principles, counsel conducting an internal corporate investigation must consider the interrelationship between the attorney-client privilege and the work product doctrine when communicating with clients and others. Such a strategy will place the client-corporation in a far more favorable position should it decide to resist subsequent requests for disclosure. It is therefore essential that corporate counsel become *actively* involved in structuring and overseeing the internal corporate investigation at the earliest possible stage, as well as directing the method and progress of such investigation, with an eye toward keeping sensitive materials protected. Specific strategies are described *infra* at Section IV.

### B. Importance of Confidentiality

As part of its internal corporate investigation, counsel may conduct many employee interviews. Although these communications may be protected under the attorney-client privilege or the work product doctrine, they have the potential to undermine the confidentiality of the investigation in several ways. First, disclosure to lower or mid-level employees of confidential information gathered during the investigation may be construed as a breach in confidentiality, unless the disclosure is necessary to convey or implement legal advice.<sup>187</sup>

Second, although most employees may not be authorized to waive the corporation's attorney-client privilege,<sup>188</sup> an employee may de-

---

184. *Connolly Data Sys., Inc. v. Victor Techs., Inc.*, 114 F.R.D. 89 (S.D. Cal. 1987).

185. *Id.* at 95.

186. Had federal law applied to the attorney-client dispute, *In re Coordinated Pretrial Proceedings*, 658 F.2d 1355 (9th Cir. 1981) would have rendered the communications privileged.

187. See *Upjohn Co. v. United States*, 449 U.S. 383, 395 n.5 (1981) (responses to questionnaires and notes of interviews not disclosed to anyone except general counsel and outside counsel).

188. See generally *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985).



cide, for whatever reason, to disclose to a third party the subject matter of communications obtained from counsel.

Counsel can address these potential problems through specific instructions that outline the importance of maintaining the confidentiality of communications pertinent to the internal investigation. In addition, counsel must limit his or her own disclosures of confidential information within the corporation to those upper-level management and directors who need the information for decision-making purposes.

Instructions given to employees concerning the need to maintain confidentiality implicate many potential ethical issues. Counsel for the corporation owes an allegiance to the corporation as an entity, rather than to any individual employee.<sup>189</sup> In many circumstances, the interests of individual employees may be adverse to the interests of the corporation, and if the corporation decides to waive the protections of the attorney-client privilege and work product doctrine, it may be to the employee's detriment. As a result, it is not difficult to imagine a situation where the corporation, in an effort to minimize exposure to liability, will move against one of its employees, where an investigation suggests culpable conduct on the employee's part.

In the interests of candor,<sup>190</sup> counsel should instruct employees that he/she represents the corporation, that he/she is not their attorney, that employees cannot, on their own, assert the attorney-client privilege to bar disclosure of the contents of an interview,<sup>191</sup> and that the corporation possesses the attorney-client privilege, but may waive it and disclose the information, to the detriment of the employee.<sup>192</sup> To the extent the employee agrees to be interviewed, counsel, to its benefit, may avoid any conflict-of-interest problems that might otherwise result from the seemingly joint representation of both the corporation and employee.<sup>193</sup>

---

189. See MODEL CODE OF PROF'L RESPONSIBILITY EC 5-18 (1980) (lawyer's allegiance to corporate client is to the entity rather than stockholder, director, officer, employee, representative, etc.); cf. MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2002) (lawyer represents organization acting through its duly authorized constituents); MODEL RULES OF PROF'L CONDUCT R. 1.13(a) cmt. n.1 (2002) ("An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents.").

190. See, e.g., *W.T. Grant Co. v. Haines*, 531 F.2d 671 (2d Cir. 1976) (court disapproved of counsel's lack of candor in interviewing employee without informing him that corporation had him as a defendant in a lawsuit filed the same day as him that corporation had named him as a defendant in a lawsuit filed the same day as the interview).

191. See *United States v. Keplinger*, 776 F.2d 678, 699-701 (7th Cir. 1985), *cert. denied*, 476 U.S. 1183 (1986).

192. See MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. n.7 (2002).

193. See *In re Gopman*, 531 F.2d 262 (5th Cir. 1976); *In re Grand Jury Investigation No. 83-30557*, 575 F. Supp. 777 (N.D. Ga. 1983); *United States v. RMI Co.*, 467 F. Supp. 915 (M.D. Pa. 1979); see also Block & Remz, *After Upjohn: The Uncertain Confidentiality of Corporate Investi-*

Fact-finding is a primary goal of any investigation, therefore an employee with relevant information is important to that effort. Thus, any corporate-type *Miranda* warning given to an employee must not be overstated, such that the employee refuses to offer any information.

Corporate counsel must recognize the importance of confidentiality and the parameters of both the attorney-client privilege and work product doctrine from the outset of an internal investigation. This outline is not meant to provide exhaustive research for litigation of these issues, but serves to advise counsel of the relevant concerns, so that these issues can be considered from the outset. Adherence to these general recommendations, along with the exercise of caution in areas of uncertainty, should place the corporation in the best possible position if these issues are subsequently litigated.

#### IV. CONCLUSION

This article has highlighted certain of the privileges accorded to lawyers that arise within the context of internal corporate investigations. The article examined the underpinnings and characteristics of the attorney-client privilege, and explored the impact of *Upjohn* in the context of internal investigations. Mention was made of the corporate self-evaluation privilege, which, although not widely recognized by the courts, may still represent a valid privilege in some jurisdictions. Finally, the contours of the work product doctrine were analyzed, with an eye to the circumstances under which the doctrine can be properly invoked, and waived, during an investigation.

Given the spate of recent corporate debacles from Enron Corp. to Arthur Andersen, internal corporate investigations have taken on increased importance. Regardless of the political and financial climate, however, corporate counsel must always be vigilant of its role as advocate of the corporate entity during an investigation. The end product of counsel's work should reflect fidelity to the corporation and responsiveness to the standards of public accountability. Striking this balance is critical.

Ideally, business decisions should reinforce legal decisions concerning the content and course of an investigation. Although the former is beyond the scope of this article, we do offer a limited set of practical recommendations that corporate counsel may take as they initiate, conduct, and conclude internal corporate investigations. Accordingly,

---

*gative Files, reprinted in Corporate Disclosure and Attorney-Client Privilege (ABA-PLI) 75 n.39 (1984) (suggesting that Miranda-like warnings be given to employees interviewed during an internal corporate investigation).*

the balance of this Conclusion is devoted to practical steps that corporate counsel should consider during the investigation process. Implementing these measures will help counsel not only fulfill its role as advocate to a corporate client, but also take advantage of the legal privileges that inhere in its position as an attorney.

### A. *Internal Investigations Procedures*

#### 1. Initiating the Investigation

##### a. Early Lawyer Involvement

Management should promptly notify the board of directors of any improprieties, so that counsel can be engaged from the outset of the investigation. If management conducts the preliminary investigation, without the involvement of counsel, it may not receive the benefits of the attorney-client privilege or work product doctrine.<sup>194</sup> The corporation may want to consider engaging outside counsel, in order to underscore the legal nature of the investigation.

##### b. Corporation Should Make Explicit Request for Legal Advice

Senior officers of the corporation should make an explicit request for counsel to provide legal, rather than business, advice. Specifically, the request should refer to a legal examination, rather than a purely factual inquiry, meaning the corporation intends the investigation to culminate in legal advice, either in the form of a recommendation for the future, or analysis of past conduct or activities. If outside counsel is hired, such a request should be included in the retention letter; if in-house counsel is involved, a memorandum to the same effect should be sent to all the necessary parties.

#### 2. Counsel's Responsibilities

##### a. Document the Confidentiality of Communications

Counsel must ensure that the confidentiality of the communications with the client is well documented, because the party asserting a claim of privilege bears the burden of proof to establish the necessary elements in support of the privilege.<sup>195</sup> Moreover, because confidentiality and waiver concerns can arise due to the number of agents of the

---

194. See Block & Barton, *Internal Corporate Investigations: Maintaining the Confidentiality of a Corporate Client's Communications with Investigative Counsel*, 35 BUS. LAW. 5, 9 (1979) (advising early briefing of board of directors and prompt retention of counsel when management receives evidence of impropriety).

195. See *United States v. Kelly*, 569 F.2d 928, 938 (5th Cir.), cert. denied, 439 U.S. 829 (1978); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 600 (N.D. Tex. 1981).

corporation and counsel involved in an investigation, counsel must assume primary responsibility for maintaining confidentiality and documenting those efforts. Memoranda or notes of interviews should indicate who was present and all documents generated should be labeled privileged and confidential.

b. Restrict the Internal Flow of Information

Counsel can demonstrate intended confidentiality of communications in several ways: (1) restricting dissemination within the corporation; (2) delivering reports from non-lawyers directly to counsel, rather than using intermediaries; and (3) maintaining files and documentation apart from general corporate files.

c. Get Information From Highest Possible Sources

In light of the limited reach of *Upjohn*, information should be obtained from the highest possible management source that is available. Although *Upjohn* rejected the notion that only upper management (i.e., the “control group”) can receive the protections of the attorney-client privilege, *Upjohn* did not, and could not, govern state court decisions, many of which continue to apply the control group principles when deciding attorney-client issues. As a result, some state courts will only extend the protections of the attorney-client privilege to upper-echelon (“control group”) management, and any confidential communications from lower-level employees will not be protected. Thus, counsel should seek to obtain information from the highest possible sources within the organization, and follow up with lower-level employees only if absolutely necessary.

d. Label Documents Judiciously

Where third parties have gathered information, counsel should clearly and explicitly (by requests, acknowledgement of receipt, etc.) indicate that the material is being gathered for the purposes of rendering legal advice “in anticipation of litigation.” It is to be noted that excessive marking of documents may weaken the privilege for the sensitive documents that need the protection most. Therefore, to the extent possible, counsel should only mark as confidential, privileged, or legal in nature, those documents that actually deserve such a designation.

e. Interpose Legal Conclusions

Counsel should strive to include mental impressions, legal theories or potential strategies in all notes or memoranda of interviews with

others, in order to afford those documents the extensive protection of opinion work product.

f. Treat Former Employee Contacts as Confidential

When communicating with former employees, counsel should maintain his/her notes in a manner that is designed to maximize the protections of the work product doctrine and advise the former employee of the confidential nature of the investigation, in order to discourage disclosure of the information to others.

3. Concluding the Investigation

a. Decision Whether to Release Report to Government

Counsel must carefully evaluate the impact on attorney-client privilege and work product protection before disclosing the report, or the results of the investigation, to a governmental agency, underwriter's counsel, accountants, or the press.

b. Legal Conclusions to the Board

Counsel should include express legal conclusions, opinions, and recommendations in the report to the board of directors.<sup>196</sup>

---

196. See Block & Barton, *supra* note 194, at 11.